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Supreme Court, U.S.
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No. _____

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In The

Supreme Court of the United States

DR. LOIS A. AVERY,

Petitioner,

v.

HOUSTON COMMUNITY COLLEGE SYSTEM AND THE BOARD OF TRUSTEES FOR THE HOUSTON COMMUNITY COLLEGE SYSTEM,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This petition presents the following questions:

I. Does Petitioner's direct and circumstantial evidence present a question of fact from which a jury could infer that the motivation behind HCCS's failure to promote Petitioner was based on race under this Court's recent decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 L.Ed.2d 105, 120 S.Ct. 2097 (2000)?

II. Does the direct and circumstantial evidence offered by Petitioner meet or exceed that quantum of evidence found to have merited a trial under this Court's recent decision in *Kolstad v. American Dental Association*, 527 U.S. 526, 144 L.Ed.2d 494, 119 S.Ct. 2118 (1999)?

III. Does the Screening Committee defense articulated by HCCS constitute a conclusive, legal defense to Petitioner's factual allegations of racial discrimination so that Petitioner is not permitted to go forward on the issue of pretext in the burden shifting formula applicable in this case? *Vadie v. Mississippi State University*, 218 F.3d 365 (5th Cir. 2000), *cert. denied*, 148 L.Ed.2d 772, 121 S.Ct. 859 (2001).

IV. Does the trial court clearly err in weighing the evidence and finding as fact that Petitioner's evidence of pretext merely demonstrates "cronyism"?

PARTIES TO THIS PROCEEDING

The petitioner in this Court, Dr. Lois A. Avery, was the plaintiff in the District Court and the appellant in the Court of Appeals.

The respondents Houston Community College System and the Board of Trustees of Houston Community College System, were the defendants in the District Court and the appellees in the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays for a writ of certiorari to review the judgment and opinion of the United States District Court for the Southern District of Texas, Houston Division, in its cause No. H-97-3305, rendered on November 30, 1998.

OPINIONS BELOW

The Opinion of the United States Court of Appeals, Fifth Circuit, is reproduced in the appendix to this petition, p. App. 1. The Final Judgment of the United States District Court for the Southern District of Texas, Houston Division is reproduced in the appendix to this petition, p. App. 3. The Memorandum and Order Granting Summary Judgment rendered by the district court is reproduced in the appendix to this petition, p. App. 4. The Order denying the Plaintiffs' Motion for New Trial by the district court is reproduced in the appendix to this petition, p. App. 43. The Notice of Appeal is reproduced in the appendix to this petition, p. App. 44.

STATEMENT OF JURISDICTION

The Opinion of the United States Court of Appeals, Fifth Circuit, was rendered on April 9, 2001. The Final Judgment and the Memorandum and Order were rendered on January 14, 2000. This Petition was timely filed within 90 days of the Opinion of the United States Court of Appeals, Fifth Circuit.

The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Without waiving Petitioner's full jurisdictional statement, Petitioner relies primarily on the following:

United States Constitution, Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment XIV, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C.A. § 1983

§ 1983. Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . "

42 U.S.C.A. § 1985

§ 1985. Conspiracy to interfere with civil rights

"(1) Preventing officer from performing duties. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

"(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to

deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

"(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C.A. § 2000e-2

§ 2000e-2. Unlawful employment practices

"(a) Employer practices. It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(l) Prohibition of discriminatory use of test scores. It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this title [*42 USCS §§ 2000e* et seq.],

> an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

STATEMENT OF THE CASE

Nature of Case

Petitioner, Dr. Lois Avery, simply requests a jury trial. The trial court and the U.S. Court of Appeals, Fifth Circuit, denied Petitioner's request. Because this Court has, on several recent occasions, offered instruction with regard to judicial weighing of evidence in this Circuit, Petitioner respectfully requests a review of the evidence presented and a remand for trial on the merits. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 L.Ed.2d 105, 120 S.Ct. 2097 (2000); and, *Kolstad v. American Dental Association*, 527 U.S. 526, 144 L.Ed.2d 494, 119 S.Ct. 2118 (1999). But *see, Vadie v. Mississippi State University*, 218 F.3d 365, at p. 373, n.23 (5th Cir. 2000), *cert. denied*, 148 L.Ed.2d 772, 121 S.Ct. 859 (2001).

Dr. Avery sued the Houston Community College System ("HCCS") and the Board of Trustees of the Houston Community College System alleging that she suffered discriminatory treatment in a denial of promotion based on consideration of race. Dr. Avery is white. At all material times, the adverse decision-makers (HCCS Board majority, Chancellor, Screening Committee majority and selectees) were black or Hispanic.

Dr. Avery established a *prima facie* case under *McDonnell Douglas Corp. v Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973).

HCCS, in response, attempted to establish a conclusive Screening Committee defense; i.e., the process was not, and could not have been, discriminatory since a Screening Committee was utilized to review the applications of candidates for the position and to make recommendations to the Board of Trustees.

Dr. Avery, in response to this articulated defense, offered evidence of racial bias in the Screening Committee process and various HCCS policies demonstrating discriminatory intent. Her evidence of the Board's policy, custom and practice included direct and circumstantial evidence.

The district court "weighed" the evidence and granted a summary judgment on January 14, 2000 dismissing the entire case. No oral argument was entertained by the trial court. The Fifth Circuit Court of Appeals heard argument and affirmed by a cryptic opinion entered April 9, 2001.

Facts of the Case

Dr. Avery filed suit against HCCS and its governing Board of Trustees alleging racial discrimination in employment decisions in violation of the First and Fourteenth Amendments of the United States Constitution; 42 U.S.C. §§ 1981, 1983, 1985, 1988; and, 42 U.S.C. §§ 2000d (Title VI) and 2000e (Title VII). Dr. Avery also alleged that HCCS retaliated against her in violation of Title VII. Dr. Avery sought declaratory and injunctive relief and attorney's fees with regard to the HCCS policy, custom and practice complained of. She sought promotion, compensatory damages, punitive damages, and attorney's fees in response to her individual claims of discrimination under the HCCS policy, custom and practice complained of.

When the lawsuit was filed, Dr. Avery had worked for HCCS as a full-time employee for approximately fifteen years. Until September 1, 1998 she was the elected President of the HCCS Administrators' Association and thereafter continued to serve as Past President.

Within HCCS, Dr. Avery advanced step-by-step, acquiring experience at each rung of the employment ladder. Based strictly on the merit of her performance, she has served as adjunct instructor, full-term instructor, Department Head, Director of Development Studies, Department Chair for Developmental Studies/Humanities at Central College, and Dean of Instruction since 1991. For more than six years, she carried the administrative load at the Northeast College as second in command under its administrative officer, Dr. Elaine Adams (black).

Dr. Avery complains in this lawsuit that she was denied fair consideration in her application to be President of HCCS Northeast College, and President of the HCCS Central College based, at least in part, on consideration of race.

HCCS asserts a screening committee defense (i.e., that screening committees made the decision thereby assuring impartiality in the process).

Dr. Avery asserts pretext and, in substantial factual detail, shows that the committees were stacked; anything but impartial; and, motivated by race. She also shows through the testimony of Board member Bruce Austin that the recommendations of the committees are commonly ignored by the Board in any event.

Evolution of Race-Based Hiring Practice

The Houston Community College System (HCCS) is a Community College District created in 1971. Tex. Educ.

Code § 130.005. It is not a state agency, but is similar to Texas Independent School District. Tex. Educ. Code § 130.084. Until 1987, the same Board of Trustees that managed the Houston Independent School District governed HCCS.

In 1989, HCCS separated from HISD and elected its first Board of Trustees. The Board of Trustees of HCCS has, since its inception, been a majority/minority board (a majority of the board members have been members of an identifiable minority group; i.e. black or Hispanic).

Every Chancellor employed by the HCCS Board of Trustees, since the first Chancellor was hired in 1990, has been of an identifiable minority group (i.e., black or Hispanic). These Chancellors include the following: Dr. Charles A. Green (black); Dr. James Harding (black); and Dr. Ruth Burgos-Sasscer (Hispanic).

Almost from its inception, race-based animus has permeated the personnel decision making within HCCS, generally under the banner of "diversity". When the six colleges were first established in 1991, then HCCS Chancellor, Charles A. Green, with Board approval, "suspended" HCCS Policies and Procedures, and began assigning the top administrative positions in each College based upon race in order to achieve "ethnic diversity" in every College.[1] Over time, minority Trustees acquired increased influence in personnel matters in "minority" districts (i.e., Northeast – black; Southeast – Hispanic; and Central – black). The policy, custom and practice in

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[1] This period came to be referred to as the "40 days and 40 nights" when each HCCS college subdivision was balanced in its administration by having 1 black, 1 white and 1 Hispanic. This system was maintained until the more aggressive minority agenda complained of herein.

issue here is not justified by HCCS as a remedial measure since none has ever been required. No consent decree exists to provide justification. Finally, it is clear that black and Hispanic citizens at all times material hereto, are neither underrepresented nor underutilized in the administrative employment category of HCCS.

The HCCS race-based system of administrative employment and promotion leaves individuals considered "white", or non-preferred minorities, with little or no opportunity to have their credentials and qualifications fairly compared with those of black and Hispanic applicants selected for such positions.

Until the past several years, as top administrators left, or were forced from, leadership positions within the Colleges, a clear policy, custom and practice of maintenance was implemented by which "white" administrators were generally replaced with white administrators. Black and Hispanic administrators were also typically replaced with administrators of the same race and ethnicity.

At all times material hereto, however, HCCS had adopted, and is implementing, an aggressive plan to reduce the number and percentage of white/non-preferred minority administrators and to increase the number and percentage of black and Hispanic administrators. Dr. Avery suffered specific, particularized injury as a proximate cause of this policy.

Evidentiary Basis of Dr. Avery's Claims

In addition to proffered deposition excerpts of Dr. James Engle, Board member Bruce Austin, Chancellor Ruth Burgos-Sasscer, and others, Dr. Avery substantially documented the offensive HCCS policy.

Dr. Avery also offered the following evidence to the trial court:

A. Discriminatory Policies and Practices:

1. HCCS's "Access and Equity Update", of July 15, 1996. The Texas Education Opportunity Plan for higher education September, 1994 through August, 2000. This document describes the Boards' hiring of Dr. Ruth Burgos-Sasscer (Hispanic) by September, 1996, and includes the following, "Goal Three: continually increase the number and proportion of black and Hispanic faculty, administrators, and professional staff towards parity with their proportional representation in the population."

   The report lists "revised projections" which apply to "EXEC/ADMIN/MANAGERIAL." Specific quotas are established for white, black and Hispanic (only) as percentages of the workforce. *The desirable "revised projections" require a decrease in the number of white management employees and an increase in black and Hispanic management employees.* Under the quotas, the number of white administrators would be balanced 50-50 (white, black and Hispanic) by the year 2000.

EXEC/ADMIN/MANAGERIAL

		Actual	Projection	Projection
	1994	1996	1998	2000
WHITE	125	71	70	65
BLACK	120	31	30	35
HISPANIC	125	20	25	30

2. Excerpts from Board minutes illustrating concern with "equity" issues (spending in minority areas rather than on non-minority constituents; and, with maintaining "minority voting strength" on the HCCS Board of Trustees (5/26/1994 and 1/22/1998).
3. HCCS Utilization Report of October 31, 1994, reflecting "no under utilization" of minority faculty in any category (black, Hispanic, or female) other than Asian/Pacific Islands. The use of utilization reports is arguably coercive with respect to hiring decisions and, as such, implicates *Hopwood*'s prohibitions. *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996); and, *Messer v. Meno*, 936 F. Supp 1280, at 1294 (W.D. Tx, Austin Div., 1996).
4. An HCCS publication, "A Vision for the Future 1997-2000" reflects Goal 2.4, "the demographics of faculty, staff and administrators will reflect the demographics of the Houston community."
5. Excerpts from official HCCS publications which demonstrate that the race-based projections described by the HCCS official policy, are being implemented and achieved, in that the percentage of white administrators is decreasing while the percentage of minority administrators is increasing. The publications excerpted are, HCCS "1997-1998 Fact Book" and the above referenced "Access and Equity 2000."
6. HCCS Document of June 6, 1997, describing Administrative Reassignments (frequently demotions) to be effective September 1, 1997. Dr. Avery has indicated race/ethnicity as to each assignment for purposes of analysis. Of the individuals to be moved, twenty-three (23) were white; nine (9) were black; and, five (5) were Hispanics. Of those, ten (10) white administrators were demoted to faculty (almost 43%). Only

four (4) of the demotions involved black administrators (approximately 20%) and three (3) Hispanic administrators (16%) were demoted.

Ironically, Asians are seldom reflected in any HCCS analysis or hiring projection even though this group is the only group considered "underrepresented".

These numbers reflect the reality of HCCS's intent; i.e., to reduce the number of white administrators and to increase the numbers of black and Hispanic administrators. An additional page, "Eliminated Positions," reflects administrative positions vacated by white personnel that were abolished or not filled.

A total of twenty-eight (28) positions in the colleges and the System are listed for elimination. Of the 28 positions, a total of 17 administrators were demoted or had their positions declared "vacant." Of these 17 administrators, 12 or about 71% of the white administrators were demoted or had their positions declared vacant. About 23% (4) of black administrators were demoted, and about 6% (1) of Hispanic administrators were demoted. Of the group of administrators who were promoted, about 57% are minorities (about 29% each or 2 each for blacks and Hispanics). Only about 43% of the white administrators were promoted, compared to 57% for blacks and Hispanics. Of the three positions declared "vacant" for considerable lengths of time, white administrators had occupied 100% of the positions. Nearly all of the administrators in these 28 positions were either demoted or promoted. Only 3 administrators of the 28 were transferred laterally.

7. Dr. Avery's notes of a September 10, 1997 meeting where it was stated the "Access and Equity"

document (with chart) was based on the general population of "Harris County."

8. Dr. Avery's analysis of Significant Administrative Appointments by college, and for the System (Central Administration), reflecting a pattern and practice of "designating" positions by race/ ethnicity (i.e., maintaining at least one white, one black, and one Hispanic in all senior, upper level administration positions).

9. Memorandum of February 6, 1998 from Chancellor Ruth Burgos-Sasscer to Dr. Avery as President of Council of College Administrators (CCA). In the Chancellor's memo, she refuses to recognize the leadership of CCA based on race because as she states, "At the present time, we have representatives from all five colleges and the System office who are also ethnically and racially diverse." Immediately after writing this memo, the Chancellor appointed two Hispanic administrators, who had not been elected by their peers, to represent CCA on the Chancellor's Council (Ms. Blanche Garcia and Mr. Manuel Reyes).

10. HCCS internal statistical analysis dated June 22, 1998 "A Vision for the Future: Critical Success Indicators and Performance Measures 1997-2000" and October 15, 1998 "Total HCCS Employees by Group! Ethnicity." Both of these documents show that HCCS is ahead of schedule in reducing the number of white administrators and increasing the numbers of black and Hispanic administrators. In 1996-1997, there was a total of 120 administrators: 68 (56.7%) white administrators, 27 (22.5%) black administrators, 22 (18.3%) Hispanic administrators and 3 (2.5%) Asian/other administrators. In 1997-1998 there were 58 (55.2%) white administrators out of 105 total administrators and on October 15, 1998

there were 58 (52%) white administrators out of 111 total administrators. In essence HCCS has reduced its percentage of white administrators and increased its percentage of minority administrators even faster than its projections in the HCCS document entitled "Access and Equity 2000" submitted to the Texas Higher Education Coordinating Board in 1995.

11. "Selected Demographic Data" presented to the HCCS Board of Trustees on January 21, 1999 shows that the number of HCCS black faculty is currently 137 (up from 130 in 1996-1997 and from 133 in 1997-1998). Number three of the report states, "With 137 Black faculty, HCCS has more than any other college in Texas; Tarrant County Junior College is next with 91." The same document reports that HCCS has 47 Hispanic faculty (up from 45 in 1996-1997 and remaining consistent at 47 during 1997-1998 to January 1999). Number 6 states, "In Texas, at 7.8% HCCS ties with Austin Community College, Mountain View College and Brookhaven College in percent of Hispanic faculty.

B. Discriminatory Screening Committee Practices:

1. Allowing Board Members to serve on the Screening Committees in violation of the HCCS Screening Committee policy stating that the " . . . hiring authority shall not serve as a member of the screening committee."
2. Violating the HCCS Screening Committee policy by stacking the committee with individuals who were openly and notoriously biased in favor or the pre-selected minority candidate for a college whose students are predominately minority (Northeast College and Central)
3. Bruce Austin, the Board President (black) and a supporter of the pre-selected candidate, Dr.

Margaret Forde (black) sat as a member of the committee and scored Dr. Forde's application with the highest possible score.

4. Roy Molonson (black), publisher of a newspaper widely read in the black community, campaigned editorially for the successful candidate in his newspaper while he sat on the committee.

5. Mildred Tate (black) was added to the committee, after it had begun to consider applications, even though she was a listed reference and zealous advocate for the eventual selectee. Tate was strategically placed to score Dr. Forde's application. Dr. Avery's group of scorers was also changed after the committee had begun its work. Dr. Avery was scored by Bruce Austin and members of the Chancellor's Management Team who were charged with writing and implementing the Chancellor's race-based assignment of administrators.

6. Dr. Avery received every of three possible scores from the four scorers in her new group (highest, good, unacceptable) which further demonstrates the lack of objectivity in an already subjective rating instrument.

7. One of the new group of Dr. Avery's scorers, Linda Compte (white), a zealous Forde supporter, was selected to score Dr. Avery and rated her "unacceptable" even though she had previously recommended Dr. Avery in her candidacy for President of the Northwest College (serving a predominately white student population).

8. A perception formed by Mr. Sam Dibrell, a non-minority screening committee member based on observations of the committee process, that " . . . diversity in academia with regard to hiring . . . is 'Well, we won't be hiring any white males.' "

9. An admission by HCCS Board President Bruce Austin that recommendations of screening committees were not binding on the Board because if the Chancellor did not agree with the recommendations " . . . she would knock them all out and start anew."

10. Manipulation of the screening committees (i.e., Johnnie Ford, a black member of the screening committee for President of HCCS Central Campus recounts that the committee was informed that Dr. Jack Daniels (black), the eventual selectee, was among the highest ranked candidates when, in fact, he had been ranked seventeenth, significantly lower than Dr. Avery who ranked sixth). Additionally, HCCS used a consultant in the screening committee process who catered to the discriminatory practices of HCCS through (A) the use of subcommittees; (B) assignment of partisans to score the pre-selected minority candidate; and, (C) actual misrepresentation as to which candidate scored highest so as to qualify for an interview.

11. Admissions that black Presidents of various HCCS colleges had been selected (A) without any screening committee recommendation whatsoever; or, (B) where a screening committee had been convened but recommended persons of a race other than the selected minority candidate.

12. A practice of appointing minority individuals generally to administrative positions where a screening committee has recommended non-minority individuals for the position.

The above evidence could persuade an objective fact finder that Dr. Forde was the pre-selected preferred minority candidate and that the screening committee make up and process was manipulated in service to an

institutional policy of hiring and promoting administrators based on race. The issue is not merely the race of the individual scorer but whether race was a motivating factor in the selection process.

This evidence, and the additional evidence submitted in Plaintiffs' Response to Defendants' Motion for Summary Judgment, Plaintiffs' Response to Defendants' Supplemental Motion for Summary Judgment, and, Plaintiffs' Response to Defendants' Summary Judgment Reply, clearly raises a fact issue under which a jury could find that HCCS has adopted a policy, custom and practice of racial discrimination and, independently, that such a policy was implemented in the denial of promotions to Dr. Avery. Additional submissions included evidence of the following nature:

1. An admission by HCCS Board President Bruce Austin that the purpose of HCCS's hiring policy is to have an ethnically diverse administrative staff that will " . . . look like the community we serve."
2. A chilling deposition dialogue described by Dr. James Engle, then the white President of HCCS Central Campus, where he was informed by Chancellor Burgos-Sasscer (Hispanic) that " . . . there are too many whites (administrators) at Central." Dr. Engle resigned shortly thereafter when Chancellor Burgos-Sasscer, in the same conversation, threatened him with "anonymous complaints." His resignation cleared the way for Dr. Jack Daniels (black) in the tainted screening committee process described herein.
4. Statistical data published and circulated by HCCS in its 1998-99 Fact Book reflecting actual implementation of minority hiring on a schedule exceeding the offensive racial quotas complained of.

6. HCCS Board minutes of January 21, 1999 reflecting the Board's continuing obsession with racially based hiring criteria.
7. Factual evidence of techniques by HCCS designed to fill vacancies with preferred minority applicants including: (A) re-posting a job vacancy to increase the minority pool of applicants; (B) re-posting a job to change and lessen qualifications to assist a favored minority candidate; (C) stacking the screening committee with partisan supporters of a particular minority candidate (i.e., Mildred Tate, a reference for Dr. Margaret Forde's candidacy for the Northeast College presidency, was a member of the screening committee evaluating Dr. Forde's and Dr. Avery's applications; (D) insuring that a majority of the screening committee is made up of minority members; and, (E) routinely requiring that at least one black, one Hispanic and one white be recommended.
8. The Chancellor, HCCS's Chief Executive Officer and the only true policy making or policy level employee, continues to publish and circulate as recently as May of 1999, documents indicating that race is used as a criterion in HCCS hiring (" . . . increase minority faculty by 1 percent in 1999-2000!").

REASONS FOR GRANTING THE WRIT

The trial court erred by granting summary judgment because it improperly evaluated Dr. Avery's evidence and failed to infer that HCCS's proffered reasons may be false or an attempt to cover up a discriminatory purpose which is reversible error. *Reeves, supra.*

HCCS has created a "powerful engine of racism" unsupported by any legal justification and, in so doing,

offends the Constitution as well as the relevant statutes cited by Dr. Avery, who is predominantly unknown, unaffluent, and unorganized, and who suffers this injustice with, to date, no relief from a court which should be the champion of the politically impotent. *Johnson v. Transportation Agency,* 480 U.S. 616, 94 L.Ed.2d 615, 107 S.Ct. 1442, at p. 677, J. Scalia dissent (1987).

The trial court, having " . . . considered all of the evidence submitted by plaintiffs," described *infra,* attributes HCCS's racial employment policies and practice to a desire by HCCS " . . . to increase minority representation in administration . . . " in furtherance of " . . . affirmative action goals." App. 15. No legal authority is cited.

Dr. Avery raised issues of intentional employment discrimination against her by HCCS in this lawsuit. *Hopwood, supra; Lesage v. Texas,* 158 F.3d 213 (5th Cir. 1998) (*"Lesage I"*) rev'd *Texas v. Lesage,* 145 L.Ed.2d 347, 120 S.Ct. 467 (1999) (*"Lesage II"*); *Allison, et al. v. Citgo Petroleum Corp.,* 151 F.3d 402 (1998); *Dallas Firefighters Association v. Dallas,* 150 F.3d 438 (5th Cir. 1998); *Johnson, supra.* Dr. Avery also raised issues of retaliation arising from institutional grievances, and truthful testimony given in a prior federal court proceeding.

This Court has determined that in certain circumstances, an employer may voluntarily establish an affirmative action plan without violating Title VII. *United Steelworkers v. Weber,* 443 U.S. 193, 197, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979). Under *Weber,* an employer's voluntary affirmative action plan is not a violation of Title VII if (1) its purpose is similar to that of Title VII, namely to "break down old patterns" of discrimination; (2) the plan does not "unnecessarily trammel" the rights of those outside the group that it is designed to protect; and (3) it

is designed to eliminate a manifest racial or sexual imbalance. *Id.* at 208; *Johnson, supra,* 480 U.S. at 628-31.

To survive an equal protection challenge under the fourteenth amendment, a racial classification must be tailored narrowly to serve a compelling governmental interest. *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 102 L.Ed.2d 854, 109 S.Ct. 706 (1989).

That standard applies to classifications intended to be remedial, as well as to those based upon invidious discrimination. *Id.* A governmental body has a compelling interest in remedying the present effects of past discrimination. *Local 28 of Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.,* 478 U.S. 421, 92 L.Ed.2d 344, 106 S.Ct. 3019 (1986). In analyzing race conscious remedial measures courts essentially are guided by four factors: (1) necessity for the relief and efficacy of alternative remedies; (2) flexibility and duration of the relief; (3) relationship of the numerical goals to the relevant labor market; and (4) impact of the relief on the rights of third parties. *United States v. Paradise,* 480 U.S. 149, 94 L.Ed.2d 203, 107 S.Ct. 1053 (1987) (4-justice plurality); *Black Fire Fighters Ass'n of Dallas v. City of Dallas,* 19 F.3d 992 (5th Cir. 1994).

The burden of establishing that an employer's voluntary affirmative action plan violates Title VII is on the plaintiff: Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is

pretextual and the plan is invalid. *Johnson, supra,* 480 U.S. at 626.

Here, HCCS never suggested that its affirmative action plan was designed to correct past discrimination, nor that HCCS suffers from a present manifest racial or sexual imbalance. As such, past discrimination and present imbalance cannot form the basis of HCCS's policy, custom and practice. *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 290-291, 106 S.Ct. 1842, 1855-56, 90 L.Ed.2d 260 (1986).

Dr. Avery alleged, independently, that HCCS by policy, custom and practice discriminates on the basis of race when making employment decisions related to the employment of college administrators. Dr. Avery also alleged that she suffered disparate treatment and was denied promotional opportunity within HCCS as a result of this policy, custom and practice.

Dr. Avery produced direct and circumstantial evidence showing:

1. A decade of control by a majority minority Board of Trustees;
2. Minutes of Board meetings demonstrating a preoccupation with accelerating minority hiring within HCCS; and,
3. Board policies under which clearly indicate:
   A. The institution is committed to hiring more minority administrators (defined as black and Hispanic only) and fewer white administrators so as to balance the numbers of each by the year 2000; and,
   B. The institution is committed to hiring administrators based on race so that the administrative staff will look like the community it serves.

4. Specific factual information demonstrating implementation of such policies.

HCCS has generally conceded that Dr. Avery established a prima facie case of discrimination, but relies primarily on an HCCS Screening Committee policy as its legitimate, non-discriminatory defense.

Dr. Avery, in substantial factual detail, established a solid basis for pretext by showing gross departure from HCCS Board Policy in the composition and implementation of the Screening Committees and offered substantial factual evidence of two different Screening Committees appointed to evaluate her qualifications. Black administrators were chosen for both college Presidencies (Central and Northeast) that Dr. Avery applied for[2].

The trial court clearly erred in applying its own analysis to a determination of the fact issues raised thereby:

1. Denying Dr. Avery the trial to which she is entitled under *Reeves, supra;* and, *Rhodes v. Guiberson Oil Tools,* 75 F.3d 989, 993-94 (5th Cir. 1993).
2. Concluding as a matter of fact and law that Dr. Avery was not harmed by discrimination and endorsing a form of racial "cronyism.";
3. Finding that the evidence submitted by Dr. Avery was no evidence of discrimination where the evidence presented far exceeds in quantity

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[2] Defendants seek to avoid having to confront documentary evidence related to its selection of a President at HCCS' Central Campus (produced by Defendants after the suit was filed) by arguing that Avery did not sue on that claim. However, this circumstantial evidence is relevant to Dr. Avery's claim and such relavance, fairly considered, cannot be denied.

and quality that standard of evidence typically encountered in cases of this type; and,

4. Finding that the evidence presented by Dr. Avery was, " . . . at best . . . some evidence of a policy by HCCS to increase minority representation in administration, and that the Board of Trustees was active in framing affirmative action goals" (citing no authority for the proposition that HCCS may hire using race as a criterion where there has been no prior adjudication of a proper complaint requiring such action as a remedy, and where HCCS's internal documentation demonstrates that neither blacks nor Hispanics are underrepresented in the administrative staff). *Johnson, supra; Lesage II; Lesage I; Hopwood, supra.*

A plaintiff's prima facie case of discrimination (as defined in *McDonnell, supra*), combined with sufficient evidence for a reasonable fact-finder to reject the employer's nondiscriminatory explanation for its decision, will generally be adequate to sustain a finding of liability for intentional discrimination. *Reeves, supra;* and, *Rhodes, supra.*

As the Supreme Court has recently determined, a failure by a trial court to infer that a defendant's proffered reasons may be false or an attempt to cover up a discriminatory purpose is reversible error. *Reeves, supra.* Direct evidence of discrimination, though prevalent here, is not required. *Id.* If circumstantial evidence is presented that would allow the finder of fact to reasonably infer intentional discrimination, then summary judgment is not proper. *Id.* Additionally, the Supreme Court found that:

> " . . . once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth

> the actual reason for its decision. Cf. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 57 L.Ed.2d 957, 98 S.Ct. 2943 (1978). In this case, it suffices to say that a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."
>
> *Id.*

Another recent case describes the quantum of proof upon which a successful plaintiff may prevail in a trial court. *Kolstad, supra* (allegations were sufficient to support judgment that hiring administrative employee was act of employment discrimination and that in the Plaintiff's view the entire selection process was a sham). The evidence approved therein was less voluminous than the tender of Dr. Avery, but included similar allegations related to job postings tailored to facilitate a pre-selected candidate.

The judgments below, in effect, adopted HCCS's suggestion that the screening committee process is a legal, rather than a factual defense to Dr. Avery's claims. In other words, since screening committees were convened to review the applicants for the various positions, HCCS has described an insurmountable defense to Dr. Avery's claims upon which HCCS should prevail as a matter of law. HCCS boldly suggests, and the trial court agreed, that Dr. Avery is unable, as a matter of law, to overcome such a legitimate, non-discriminatory reason.

To any objective fact finder, the HCCS screening committee process raises more factual issues than it quiets.

Dr. Avery's evidence showed that the discriminatory policy complained of is standard operating procedure at

HCCS. Dr. Avery's complaint is not based on isolated, accidental or sporadic acts.

Certainly Dr. Avery's offer of evidence exceeds that quantum discussed by the Supreme Court in *Kolstad*. *Kolstad, supra.* Dr. Avery would respectfully urge that the quantity and quality of evidence of intentional discrimination lodged here not only exceeds the evidence accepted on the underlying issue in that case but also exceeds the "reckless or callous disregard" standard announced by the Supreme Court as guidance when determining whether an award of punitive damages is appropriate.

The Court erred in its suggestion that Dr. Avery had not, and cannot, show retaliation.[3] HCCS suggested that the Court lacked ancillary jurisdiction over such matters but these issues were properly before the trial court. *Gupta v. East Texas State University,* 654 F.2d 411 (5th Cir. 1981) citing *Pettway v. American Cast Iron Pipe Co.,* 411 F.2d 998 (5th Cir.), rehearing and rehearing *en banc* denied, 415 F.2d 1376 (5th Cir. 1969).

The analysis contained in the trial court's Memorandum and Opinion misses the primary thrust of Dr. Avery's case and fails to provide a legal framework for the patent racial discrimination before it.

Earlier in the litigation, HCCS stated to the trial court that the race based employment practices proved by Dr.

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[3] The Memorandum and Opinion erroneously fails to note that Pat Williamson (HCCS's representative in the *Mullis* trial) was Dr. Avery's other evaluator for the Northeast College Presidency position when the court opines that Dr. Avery could not have suffered retaliation by non-promotion for testifying to the race based institutional policy in litigation which resulted in a substantial adverse judgment against the institution.

Avery were in keeping with " . . . (HCCS's) permissible goal of increasing minority representation among its administrative staff so that underrepresented groups are proportionally represented." On that admission, Dr. Avery moved for partial summary judgment because (1) neither blacks nor Hispanics are underrepresented in HCCS administration, and, (2) clear limitations on such employment practices are set out by the Supreme Court in *Johnson, supra.*

The Plaintiffs' Motion for Partial Summary Judgment was denied.

The dispositive Memorandum and Opinion strains to answer the same inquiry but its only significant comment fails to improve on HCCS's earlier effort.

HCCS has never appeared to expressly rely on the concept of affirmative action, perhaps because of the lack of any legal justification for its use at HCCS. The theoretical justification advanced by Trustee Bruce Austin and Chancellor Ruth Burgos-Sasscer (i.e., role model theories, etc.) is largely trumped by the Fifth Circuit's teaching in *Hopwood, supra.* Neither HCCS, nor the trial court's Memorandum and Opinion cite any legal basis or support for such pronouncements in the face of *Johnson* and *Hopwood.*

The notion is a stubborn one but particularly suspect where its most strident proponents shy away from articulating a definition or parameter. However, it is clearly outcome determinative here.

Here, there exists no manifest racial or sexual imbalance in this workforce upon which this institutional employer may rely to justify consideration of race or sex in making employment decisions. *Johnson, supra* at pp. 626-627. There is no conspicuous racial imbalance in the HCCS administrative staff with regard to minority

employment. *Id.*, at pp. 627-630 and 637-640; *Wygant, supra*. In HCCS, maintenance of an artificial racial balance is the impermissible practice with overrepresentation the impermissible goal. *Johnson, supra,* at p. 630.

The HCCS policy, custom and practice complained of is not designed to be remedial, is not justified by HCCS as a remedial measure, and, in fact, is not remedial. *Wygant, supra.* Absent some showing by HCCS, such a policy becomes the "perversion of Title VII" (42 U.S.C.A. § 2000e) described by the Court in *Johnson. Johnson, supra,* J. White dissent, at p. 657.

Once the Memorandum and Opinion dismissed all of Dr. Avery's evidence as affirmative action, and ignored evidence not so easily categorized, it was then free to methodically march through the formalistic application of tests cited by Dr. Avery in *Citgo, supra,* only to find, at the end, that Dr. Avery had no evidence. Having already removed the essential elements of Dr. Avery's case, the compelled conclusion is that there is nothing in the crucible.

Anything surviving such an analysis is then subjected, not to the strict scrutiny to which it is entitled, but to the author's analysis and wholesale adoption of the HCCS's articulated factual defenses.

This Court has recently reversed such a holding by the Fifth Circuit and suggested that such factual matters as are advanced by an individual, Dr. Avery here, should be tried to a jury. *Reeves, supra;* and, *Rhodes, supra.* Dr. Avery would urge that if *Reeves* had issued earlier, the instant Memorandum and Opinion would, in all likelihood, not have been written.

HCCS suggests that various articulated factual scenarios, urged as legitimate nondiscriminatory justifications, are either conclusively established against Dr. Avery or of such a solid construction that they may not, as a matter of law, be considered pretextual on scrutiny by a jury. Such reasoning is unusual even though HCCS has spent a substantial amount of energy in attempting to establish such a position. Although accustomed to preferential treatment by a Court, the government must realize at some point that a jury may decide contested facts regarding its behavior. The burden shifting formula applicable in this area is not so scientific that a trial court is required to find for the government in every instance. Nowhere is HCCS's frustration more apparent than in its refusal to consider the evidence martialed against the credibility of the screening committee defense. HCCS, essentially, lists argument after argument but refuses to realize that such arguments are properly submitted to a jury after the presentation of the evidence by both sides.

Dr. Avery does not suggest that HCCS is without facts or potentially effective cross examination of Dr. Avery, or other witnesses who may be called to corroborate her position. That is what typically drives litigation and that is why a jury is routinely called upon to consider the arguments made by both sides and to answer the ultimate factual controversies. However, Dr. Avery is less sympathetic to HCCS where it attempts to reformat her claims to facilitate a desired summary disposition, particularly where HCCS is trying to fit a square peg into a round hole.

CONCLUSION

Dr. Avery respectfully asks this Court to reverse and render where appropriate on the policy issue as to whether a governmental unit like HCCS, under the circumstances of this case, may use race as a criterion for administrative employment under a general banner of "affirmative action;" and, to reverse and remand for trial of her particularized claims related to disparate treatment under the discriminatory policy, custom and practice complained of.

The clear errors of the trial court, and the evidence in the record, require that:

A. The Final Judgment in this case be reversed and rendered, in part on the issue of HCCS policy and practice, and reversed and remanded in part for trial on Petitioner's particularized complaint; and,

B. The Memorandum and Order granting Appellees' Motion for Summary Judgment be reversed and rendered, in part on the issue of HCCS policy and practice, and reversed and remanded in part for trial on Petitioner's particularized complaint.

Respectfully submitted,

GEORGE M. KIRK & ASSOCIATES, P.C.

GEORGE M. KIRK
Attorney of Record
for Petitioner

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No 00-20261

DR. LOIS A. AVERY, ET AL.,

Plaintiffs,

DR. LOIS A. AVERY AND ROGER SIMMONS,

Plaintiffs-Appellants,

VERSUS

HOUSTON COMMUNITY COLLEGE SYSTEM
AND
THE BOARD OF TRUSTEES FOR THE HOUSTON COMMUNITY COLLEGE SYSTEMS,

Defendants-Appellees,

Appeal from the United States District Court
for the Southern District of Texas
(H-98-CV-1859)

(Filed Apr. 9, 2001)

Before REAVLEY, SMITH, and DEMOSS, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The plaintiffs, who are white, sued for race discrimination and retaliation. In a comprehensive and convincing forty-seven page opinion, the district court dismissed the claims.

We have reviewed the briefs and have heard the arguments of counsel and have examined the pertinent portions of the record. Essentially for the reasons given by the district court, the judgment is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DR. LOIS A. AVERY, THOMAS BAXTER, and ROGER SIMMONS, Plaintiffs,	§	CIVIL ACTION NO. H-98-1859
v.	§	
HOUSTON COMMUNITY COLLEGE SYSTEM, et al., Defendants.	§	

FINAL JUDGMENT

In accordance with the court's Memorandum and Order granting Defendant's Motion for Summary Judgment, this action is **DISMISSED with prejudice**. Avery's claim for denial of promotion to Vice-Chancellor for Academic Development is **DISMISSED without prejudice**. All other claims of Avery, Baxter, and Simmons are **DISMISSED with prejudice**.

This is a **FINAL JUDGMENT**.

SIGNED at Houston, Texas, on this 14th day of January, 2000.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DR. LOIS A. AVERY, THOMAS BAXTER, and ROGER SIMMONS, Plaintiffs,	§	CIVIL ACTION NO. H-98-1859
v.	§	
HOUSTON COMMUNITY COLLEGE SYSTEM, et al., Defendants.	§	

MEMORANDUM AND ORDER

Plaintiffs, Dr. Lois Avery, Thomas Baxter, and Roger Simmons, bring this action against Houston Community College System and its governing Board of Trustees (HCCS) alleging racial discrimination in employment decisions in violation of the United States Constitution, 42 U.S.C. §§ 1981, 1983, 1985, 1988,[1] and Titles VI and VII of the Civil Rights Act of 1964 (Title VI and Title VII), 42 U.S.C. §§ 2000d and 2000e et seq. Plaintiffs also allege that HCCS retaliated against them in violation of Title VII. Plaintiffs seek declaratory and injunctive relief, compensatory damages, punitive damages, and attorney's fees. Pending before the court are the cross-motions of HCCS and plaintiffs for summary judgment.[2]

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[1] 42 U.S.C. § 1988 authorizes the award of attorney's fees and expert's fees for civil rights violations; it is not a separate cause of action. *See* 42 U.S.C. § 1988 (West 1999).

[2] The motion papers are docketed as follows: (1) HCCS's Motion for Summary Judgment (Docket Entry No. 41) and

I. Summary Judgment Standard

Summary judgment is warranted if a party establishes that there is no genuine dispute about any material fact and the law entitles it to judgment. Fed. R. Civ. P. 56(c). The Supreme Court has interpreted the plain language of Rule 56(c) to mandate "the entry of summary judgment, after adequate time for discovery and upon motion, against any party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex v. Catrett*, 106 S.Ct. 2548, 2552 (1986). The nonmoving party must go beyond the pleadings and show by affidavits, depositions, answers to interrogatories, or admissions on file that specific facts exist over which there is a genuine issue for trial. *See Celotex*, 106 S.Ct. at 2553. All justifiable inferences will be drawn in the nonmovant's favor, *see Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2502, 2513 (1986), but conclusory affidavits will not suffice to create or negate a genuine issue of fact. *See Reese v. Anderson*, 926 F.2d 494, 498 (5th Cir. 1991); *Shaffer v. Williams*, 794 F.2d 1030, 1033 (5th Cir. 1986). Furthermore, Rule 56 does not impose upon the court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment; instead, the nonmovant must identify specific evidence and articulate precisely how it supports its

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Plaintiffs' Response (Docket Entry No. 51); (2) HCCS's Supplemental Motion for Summary Judgment (Docket Entry No. 49) and Plaintiffs' Response (Docket Entry No. 59); and (3) Avery's Motion for Partial Summary Judgment (Docket Entry No. 50) and HCCS's Response (Docket Entry No. 56).

claim. *See Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). Unless there is sufficient evidence for a jury to return a verdict in the nonmovant's favor, there is no genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. at 2511. Admissibility of evidence on a motion for summary judgment is subject to the standards and rules that govern evidence at trial. *See Rushing v. Kansas City Southern Railway Co.*, 185 F.3d 496 (5th Cir. 1999).

II. Background

Plaintiffs, all of whom are white, were employed at HCCS in various administrative capacities. Dr. Lois Avery is currently the Dean of Academic Development at HCCS; during the times at issue in this action she was the Dean of Instruction at the Northeast College campus of HCCS. Thomas Baxter is currently the Director of Corrections at HCCS; during the times at issue in this action he held several positions, including the one he currently occupies. Roger Simmons left HCCS in January of 1999; he served as Coordinator of the Technology Center during the time at issue in this action.

Avery has worked at HCCS for 15 years, working her way up the administrative chain. *See* Deposition of Dr. Lois Avery p. 22, Exhibit A to Defendants' Motion for Summary Judgment (Docket Entry No. 42). In 1997 she applied for the position of President of Northeast College. She was not interviewed for the position. Dr. Margaret Forde, an African American, was appointed President of Northeast College. Avery also applied for the position of Vice-Chancellor of Academic Development and was

not selected. *See* Plaintiffs' First Amended Complaint (Docket Entry No. 20). Avery also applied to become President of Central College and was not selected. *See* EEOC Charge of Discrimination: Lois Avery, Exhibit A to Plaintiffs' Response to Defendants' Motion for Summary Judgment (Docket Entry No. 52).

Baxter has been an administrator at HCCS for eleven years. *See* Plaintiffs' First Amended Complaint (Docket Entry No. 20). He was the Coordinator of Criminal Justice in 1997 when HCCS underwent a reorganization that eliminated Institutional Coordinator positions system-wide, which included Baxter's job. *See id.* He became Coordinator of Correctional Programs following the reorganization. *See id.* Baxter applied for a Dean of Work Force position at Northeast College in October of 1997, but was not selected. *See id.* A Hispanic male was selected for the position. On February 17, 1998, Baxter was suspended for seven months for improperly signing a form allowing an employee to take classes at a discount. The employee in question took classes on duty time in violation of HCCS policy; the employee (an African American) was also suspended. When Baxter returned from suspension he worked temporarily as the Coordinator of the Waltrip Campus and later returned to being Coordinator of Correctional Programs. *See* Deposition of Thomas Baxter, Exhibit B to Defendants' Motion for Summary Judgment (Docket Entry No. 42).

Simmons has been an administrator for HCCS for eight years. *See* Plaintiffs' First Amended Complaint (Docket Entry No. 20). Simmons served as Coordinator for Transportation Training at the Northeast College. *See* Plaintiffs' First Amended Complaint (Docket Entry No.

20). Simmons lost this position during the 1997 reorganization and asked for transfer to Coordinator at the Technical Center. For approximately four months Simmons served as an automotive instructor while still being paid at the level of his previous position. *See* Deposition of Roger Simmons, pp. 165-66, Exhibit F to Defendants' Motion for Summary Judgment (Docket Entry No. 42). Around February of 1998 he became Coordinator at the Technology Center. Simmons applied for the same Dean of Work Force position at Northeast College for which Baxter applied. Simmons did not get the job. Simmons also applied to be the College Operations Officer (COO) at Southeast College and was not selected. Simmons also states he applied for dean level positions and was not selected. *See* Plaintiffs' First Amended Complaint (Docket Entry No. 20).

All three plaintiffs filed charges of discrimination with the Equal Employment Opportunity Commission on October 8, 1997. *See* Charge Information Forms, EEOC Houston District Office: Lois Avery, Thomas Baxter, Roger Simmons, Exhibits A-C to Plaintiffs' Response to Defendants' Motion for Summary Judgment (Docket Entry No. 52). Plaintiffs received right-to-sue letters from the EEOC in April of 1998. *See id.* Plaintiffs filed this action on June 16, 1998, and filed their First Amended Complaint on February 16, 1999. *See* Plaintiffs' Original Complaint (Docket Entry No. 1); Plaintiffs' First Amended Complaint (Docket Entry No. 20).

III. Plaintiffs' Allegations

Plaintiffs all allege that they were denied promotions based on their race (white) due to a policy, pattern, or practice of increasing minority representation in administrative positions at HCCS; they also allege disparate impact of facially neutral policies based on racial discrimination. All three plaintiffs also allege that they were subjected to a racially hostile work environment. They also allege retaliation based on their EEOC claims and because of their testimony in a trial against HCCS. Because the three plaintiffs worked in different areas of the HCCS system, however, their specific allegations are quite diverse.

Avery alleges that Dr. Forde was promoted to President of Northeast College based on her race. Avery alleges that she was more qualified for the position than Dr. Forde and that the sole criterion used to exclude her was race. Avery also alleges that she was subjected to a racially hostile working environment by her immediate supervisor, Dr. Elaine Adams. Avery also alleges that she was retaliated against for her testimony in a 1996 action against HCCS, *Mullis v. HCCS*. She claims that her workload increased around the time of the Mullis trial and that her supervisor, Dr. Adams, spoke negatively of her performance and accused her of not being staunchly behind the contemporaneous HCCS reorganization. *See* Avery Deposition at p. 400, Exhibit A to Defendants' Motion for Summary Judgment (Docket Entry No. 41).

Baxter alleges that the successful candidates for the promotions for which he applied were less qualified than he was and that race was the determinative factor in their

success. He also alleges that his suspension was purely pretextual and that he was told that "since a black person had been suspended, a white person needed to be suspended." Plaintiffs' First Amended Complaint, p. 10 (Docket Entry No. 20). Baxter alleges that minority administrators who signed the same type of form he improperly signed were not disciplined. Baxter also alleges that his suspension was in retaliation for his testimony in the *Mullis* trial.

Simmons alleges that he was denied promotions based solely on race and that he was more qualified than the successful candidates for those positions. He also alleges that he was demoted based on his race to automotive instructor, and that minorities caught up in the reorganization were better treated than he was by HCCS. He alleges that many of the positions for which he applied were reposted with changed job requirements to favor minorities. Simmons also alleges that HCCS retaliated against him for his testimony in the *Mullis* trial by eliminating his original Coordinator position during the reorganization. Simmons also claims his supervisor retaliated against him by asking him to assist in taking an inventory of the Transportation building after Simmons served as Coordinator of the Transportation Training Center.

IV. HCCS's Motion for Summary Judgment

HCCS argues that it is entitled to summary judgment on all of plaintiffs' claims. HCCS argues that it did not retaliate against plaintiffs for any constitutionally protected behavior, and that no causal link between the protected behavior and any employment decisions can be

proven. HCCS also argues that the employment actions complained of by plaintiffs were not causally related to their testimony in the *Mullis* case or any other constitutionally protected behavior. HCCS argues that it had legitimate, nondiscriminatory reasons for each of the employment decisions at issue, and that illegal racial animus did not motivate its treatment of plaintiffs or its hiring practices. Furthermore, HCCS argues that the actions complained of – chiefly, added workloads, criticism, and administrative assignments – are not the kind of ultimate employment actions that trigger § 1983 or Title VII protection. HCCS assails plaintiffs' statistical and anecdotal evidence of a "pattern or practice" of minority preference as statistically insignificant and insufficient to meet plaintiffs' burden of proof. HCCS similarly assails plaintiffs' evidence of disparate treatment based on race in violation of Title VII as insignificant. Finally, HCCS argues that plaintiffs cannot state a claim under Title VI and cannot prove any claims that they may state.

Plaintiffs respond to HCCS's motion with a general denial and a request that the court take judicial notice of essentially the entire record in this case. *See* Plaintiffs' Response to Defendants' Motion for Summary Judgment, p. 25 (Docket Entry No. 51). Although plaintiffs filed four inches of exhibits to their Response rarely do plaintiffs identify a particular piece of evidence by document or page number.[3] The court is not required to scour the

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[3] Typical of plaintiffs' "evidence" in its Response is its assertion that "Plaintiffs would respectfully urge that the quantity and quality of evidence of intentional discrimination

record for evidence to support plaintiffs' claims; plaintiffs must specifically identify evidence that supports their claims and state how the evidence supports their claims. *See Raga,* 136 F.3d at 458.

A. Plaintiffs' Claims under the United States Constitution

Plaintiffs claim that HCCS retaliated against them in violation of the First Amendment for their testimony against HCCS in *Mullis v. HCCS.* Plaintiffs also claim racial discrimination in violation of the Fourteenth Amendment. These constitutional claims are cognizable through 42 U.S.C. § 1983, which provides a remedy for every person deprived under color of state law of the rights, privileges, or immunities secured by the Constitution. *See* 42 U.S.C. § 1983 (West Supp. 1999). Plaintiffs have the burden of pleading and proving the elements of the underlying deprivation of constitutional rights and that the deprivation was undertaken under color of law. *See Harrington v. Harris,* 118 F.3d 359, 365 (5th Cir. 1997). Plaintiffs must therefore prove that they suffered constitutional harm due to a policy of HCCS. *See Monell v. Dept. of Social Services,* 98 S.Ct. 2018, 2037-38 (1978). For a First Amendment violation plaintiffs must show that the retaliation or harm suffered was causally connected to protected First Amendment activities. *See Fowler v. Smith,* 68

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lodged here . . . exceeds the evidence accepted [in a Supreme Court case]. *See* Plaintiffs' Response to Defendants' Motion for Summary Judgment ¶ 61 (Docket Entry No. 51). Plaintiffs apparently expect the court to figure out how and what evidence they are referring to: They cite nothing.

F.3d 124 (5th Cir. 1995). To show violation of the Fourteenth Amendment plaintiffs must show that HCCS was motivated by discriminatory intent: Mere disparate impact will not suffice. *See Washington v. Davis*, 96 S.Ct. 2040, 2047 (1976). The elements of a claim of racial discrimination under § 1983 are the same as those under Title VII. *See Hicks v. St. Mary's Honor Center*, 113 S.Ct. 2742 (1993).

1. Plaintiffs' Fourteenth Amendment Claims

With no elaboration plaintiffs allege generally that defendants' conduct violates the Fourteenth Amendment to the Constitution. *See* Plaintiffs' First Amended Complaint, ¶ 34 (Docket Entry No. 20). The court reads their complaint to allege an equal protection violation based on a theory that HCCS intentionally favors minorities over whites. 42 U.S.C. § 1983 provides a vehicle for redress of constitutional violations in certain situations. However, plaintiffs must establish a policy of HCCS itself to discriminate against whites in order to prevail under § 1983 on their equal protection claim. *See Monell v. Dept. of Soc. Services*, 98 S.Ct. 2018, 2037 (1978).

In response to Defendants' Motion for Summary Judgment, which argues that plaintiffs fail to identify an official policy of the Board of Trustees of HCCS that deprived them of a constitutionally protected right that was the moving force behind their injuries (*See* Defendants' Motion for Summary Judgment at pp. 40 and 41 (Docket Entry No. 41).), plaintiffs merely respond that "[p]laintiffs find the 'policy maker' discussion interesting while again referring the court to plaintiffs' evidence on

the central issue of HCCS policy and practice." *See* Plaintiffs' Response to Defendants' Motion for Summary Judgment, ¶ 65 (Docket Entry No. 51). In their Response to Defendants' Supplemental Motion for Summary Judgment plaintiffs refer to a few items in the record, which they argue in very general terms support their Fourteenth Amendment claim. *See* Plaintiffs' Response to Defendants' Supplemental Motion for Summary Judgment at pp. 3 and 4 (Docket Entry No. 59).

Plaintiffs point chiefly to meeting minutes of the HCCS Board of Trustees, indicating parliamentary difficulties and disagreement about hiring specific individuals, and encourage the court to read this evidence as censured to remove the most damning proof of racial animus in those hiring decisions. *See* Plaintiffs' Response to Defendants' Supplemental Motion for Summary Judgment, p. 2 n.2 (Docket Entry No. 59) . Because the Board meetings plaintiffs refer to took place long after they applied for and were denied promotions, they are not evidence of any animus towards plaintiffs as to any of the injuries they claim. Furthermore, the Board Minutes in question are not evidence of anything but discord among members of the Board. Indeed, one of the Board members in question testified that he did not leave the July 22, 1999, Board Meeting to protest a white being hired, as plaintiffs contend, but that he left to participate in a political debate. *See* Deposition of Abel Davila, p. 44, Defendants' Motion for Leave to File Supplemental Summary Judgment Evidence (Docket Entry No. 61).

Plaintiffs offer a statement in the deposition of Chancellor Burgos-Sasscer that "the Board" asked her to add a "goal" to her priorities of encouraging diversity among

faculty, staff, and administrators. *See* Deposition of Ruth Burgos-Sasscer, p. 155, Exhibit A to Plaintiffs' Response to Defendants' Supplemental Motion for Summary Judgment (Docket Entry No. 59). Burgos-Sasscer testified that the Board added a line to a document entitled "Preparing for the 21st Century" stating "[t]he demographics of faculty, staff and administrators will reflect the demographics of the Houston community." *See id.* This is not evidence of a policy to discriminate against white administrators.

Plaintiffs also refer to the August 3, 1999, Board Minutes, which contain a statement by Burgos-Sasscer that HCCS's organizational chart "reflects her goals and targets – [and] that the college is striving toward enhanced diversity and elimination of discrimination." *See* Board Meeting Minutes, Aug. 3, 1999, Exhibit D to Plaintiffs' Response to Defendants' Supplemental Motion for Summary Judgment (Docket Entry No. 59). These and similar statements of HCCS's concerns about racial diversity (in this case made long after the employment decisions complained of by plaintiffs) are not evidence of a policy against white administrators. The court has considered all of the evidence submitted by plaintiffs. At best plaintiffs present some evidence of a policy by HCCS to increase minority representation in administration, and that the Board of Trustees was active in framing affirmative action goals. Because plaintiffs have not presented evidence of a policy of discriminating against white administrators or of discriminatory intent, HCCS is entitled to summary judgment on plaintiffs' Fourteenth Amendment claim.

2. Plaintiffs' First Amendment Claims

In order to establish a First Amendment violation under § 1983 a plaintiff must show that he engaged in constitutionally protected conduct, and that the conduct was a substantial or motivating factor in the adverse employment decision he suffered. *See Mt. Healthy City School Dist v. Doyle*, 97 S.Ct. 568, 576 (1977). Furthermore, because § 1983 only protects against actions taken under color of state law, plaintiffs must prove that the action taken against them was a result of an established policy. *See Harrinaton v. Harris*, 118 F.3d 359, 365 (5th Cir. 1997). If a plaintiff does so, the defendant may show by a preponderance of the evidence that it would have reached the same employment decision in the absence of the protected conduct. *See Harrington*, 118 F.3d at 365. Only certain adverse employment decisions are protected under the framework of § 1983: "Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands." *Id., quoting Pierce v. Texas Dep't. of Crim. Justice Inst. Div.*, 37 F.3d 1146, 1149 (5th Cir. 1994). "Actions such as decisions concerning teaching assignments, pay increases, administrative matters, and departmental procedures . . . do not rise to the level of a constitutional deprivation." *Harrington*, 118 F.3d at 365, *citing Dorsett v. Bd. of Trustees for State Colleges & Universities*, 940 F.2d 121, 123 (5th Cir. 1991). For the purposes of the pending motions the court will assume that testifying at trial is a protected First Amendment activity although HCCS argues that it is not. Therefore, the critical questions are: (1) did plaintiffs suffer an adverse employment action, and, if so, (2) was that

adverse employment action taken in retaliation for plaintiffs' exercise of their right of free speech? *See Harrington*, 118 F.3d at 365.

HCCS argues that most of the retaliation alleged by plaintiffs does not amount to an adverse employment action that triggers constitutional concern. HCCS also argues that plaintiffs cannot show any causal link between their testimony in the *Mullis* trial and subsequent employment actions by HCCS, let alone any substantial link. Finally, HCCS argues that the same employment decisions would have been taken in the absence of their testimony against HCCS.

The acts of retaliation listed by plaintiffs are many. Plaintiffs do not distinguish which illegal motivations prompted which alleged acts of retaliation, stating only that retaliation was based on: (1) their race, (2) their reluctance to implement the pattern and practice of discrimination at HCCS as ordered, (3) their testimony at the *Mullis* trial, (4) their filing of both HCCS system and EEOC complaints, and (5) their filing of this action. *See* Plaintiffs' First Amended Complaint, p. 11 (Docket Entry No. 20).

Many of the acts alleged by plaintiffs are not adverse employment actions protected by § 1983. Specifically, Avery's claims that her workload increased and that her supervisor criticized her are not cognizable. *See Harrington*, 118 F.3d at 365-66. She also alleges that her supervisor, Dr. Adams, accused her of forwarding paperwork for a hiring recommendation without Dr. Adams' signature. Avery alleges that this accusation was untrue and done to retaliate against her for her deposition testimony

in the *Mullis* trial. *See* Avery Deposition at pp. 399-402, exhibit A to Defendants' Motion for Summary Judgment (Docket Entry No. 42). Without a formal reprimand mere criticism will not support a retaliation claim under § 1983. *See Harrington,* 118 F.3d at 365-66. Avery also alleges that Dr. Adams retaliated against not only Avery but her entire organizational level at HCCS, the Instructional Deans. *See* Avery Deposition at pp. 398-99, Exhibit A to Defendants' Motion for Summary Judgment (Docket Entry No. 42). Avery admits that she has no personal knowledge that Dr. Adams was involved in fomenting displeasure with the Instructional Deans' performance. *See id.* at 406. Simmons claims that he had to participate in an inventory of the Transportation building that he felt was unfair. Even if true this claim is not an adverse employment action. *See* id. Accordingly, none of these incidents will support claims of retaliation in violation of the First Amendment under § 1983.

Some of the plaintiffs' claims, however, do involve adverse employment actions. Avery claims she was denied promotion to the position of President of Northeast College and later to Vice-Chancellor of Academic Development. Baxter claims that his seven-month suspension was retaliatory. Simmons claims that HCCS used the reorganization as an opportunity to retaliate against him by eliminating his position, and that he was then demoted to instructor as a retaliatory measure. The court will deal with each claim in turn.

a. Avery's Claims

Avery alleges that she was denied two promotions in retaliation for her testimony in the *Mullis* trial during February of 1996 and for several other reasons. *See* Plaintiffs' First Amended Complaint (Docket Entry No. 20). Avery presents no evidence that HCCS's failure to promote her was retaliatory except her own conclusions. This will not suffice to create a disputed issue of material fact. *See Reese*, 926 F.2d 494, 498 (5th Cir. 1991). Accordingly, HCCS is entitled to summary judgment on Avery's claim of First Amendment retaliation under § 1983.

b. Baxter's Claims

Baxter claims that his seven-month suspension was retaliatory. HCCS presents evidence that his suspension was for signing a form authorizing education benefits for an employee whom he did not supervise. Baxter does not dispute signing the form and has no explanation for why he did so. *See* Statement of Thomas Baxter (Jan. 5, 1998), Exhibit W to Plaintiffs' Response to Defendants' Motion for Summary Judgment (Docket Entry No. 52). Instead he claims that black administrators were not punished for signing the same form based on the same information that Baxter had from the employee. *See* Statement of Dr. Anna Harris, Exhibit Y to Plaintiffs' Response to Defendants' Motion for Summary Judgment (Docket Entry No. 52).

This argument misses the point. HCCS did not suspend Baxter for failing to get enough information from the employee, but because Baxter was not the employee's supervisor – the only person authorized to sign such a

form. Baxter acknowledges this fact stating that he "should not have signed them [the waiver forms]." *See* Statement of Thomas Baxter, Exhibit W to Plaintiffs' Response to Defendants' Motion for Summary Judgment (Docket Entry No. 52). Baxter has not presented evidence that black administrators signed such forms for anyone who was not their employee; Dr. Harris only stated that on a rotating basis administrators were authorized to sign such forms. *See* Statement of Anna Harris, Exhibit Y to Plaintiffs' Response to Defendants' Motion (Docket Entry No. 52). Baxter presents no evidence that he was so authorized when he signed the waiver forms or that any other administrator signed them without authorization.

Finally, it is undisputed that Baxter was suspended beginning in February of 1998, at least two years after his *Mullis* testimony. *See* Baxter Deposition at pp. 8 and 100, Exhibit B to Defendants' Motion for Summary Judgment (Docket Entry No. 42). The court concludes that Baxter's proffered evidence fails to show any causal link between his speech and his suspension and that HCCS is entitled to summary judgment on Baxter's First Amendment claims.

c. Simmons' Claims

Simmons claims that HCCS used the 1996 reorganization as an opportunity to retaliate against him by eliminating his position and then demoting him. HCCS argues that Simmons' entire organizational level, Instructional Coordinators, was eliminated in order to shift to a department chair structure and that retaliating against one employee was not a motivation for that decision.

HCCS also argues that Simmons was not demoted, but laterally transferred to a position of his choice as soon as it became available. Simmons acknowledges that all positions with his job title were eliminated, but he contends that HCCS delayed the lateral transfer and that he heard that someone had recommended not eliminating his position. *See* Simmons Deposition at pp. 225-27, Exhibit F to Defendants' Motion for Summary Judgment (Docket Entry No. 42). Simmons acknowledges that he spent only four months in an instructional position before his lateral transfer and was paid at his former salary level throughout. *See* Simmons Deposition at p. 32, Exhibit F to Defendants' Motion for Summary Judgment (Docket Entry No. 42). Furthermore, Simmons voluntarily continued teaching automotive – the very job he contends was a demotion – as a second night job after he was made Coordinator of the Technology Center. *See id.* at p. 47. Simmons feels that although the pay and organizational level were the same for his new position as Coordinator of the Technology Center, it was a demotion because his responsibilities were fewer. *See id.* at pp. 33-34. Because Simmons presents no evidence that any of these actions were causally related to his *Mullis* testimony, HCCS is entitled to summary judgment on Simmons' claims of First Amendment retaliation under § 1983.

B. Plaintiffs' Racial Discrimination Claims

Plaintiffs claim that the behavior of HCCS violated Title VII and 42 U.S.C. § 1981. Title VII prohibits employers from discriminating against employees on the bases of race, color, religion, sex, or national origin. *See* 42

U.S.C. § 2000e-2(a)(1999). Section 1981 prohibits racial discrimination in the making and enforcement of contracts. *See* 42 U.S.C. § 1981 (1998). "[T]he term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). To state a claim under Section 1981 plaintiffs must show intentional discrimination on account of race. *See Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996). Both causes of action require that racial discrimination actually motivate the employment decision at issue. *See Guillory v. St. Landry Parish Police Jury*, 802 F.2d 822, 824 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 3190 (1987); *Grimes v. Texas Dept. of Mental Health & Mental Retardation*, 102 F.3d 137, 149 (5th Cir. 1996). Because the elements of plaintiffs' Title VII and § 1981 claims are identical, the court employs the same analysis in evaluating these claims. *See Anderson v. Douglas & Lomason Co., Inc.*, 26 F.3d 1277, 1285 n.4 (5th Cir. 1994).

1. Plaintiffs' Direct Evidence

Plaintiffs state that they have direct and circumstantial evidence that racial discrimination motivated HCCS's decisions about their employment. They fail to distinguish, however, between the evidence intended to fit each category. Direct evidence of discriminatory motive is evidence which, if believed, proves the fact of discrimination without inference or presumption. *See Brown v. East Miss. Elec. Power Ass' n.*, 989 F.2d 858, 861 (5th Cir. 1993). The court has no obligation to scour plaintiffs' evidence looking for direct evidence of discrimination. *See Raga*,

136 F.3d at 458. However, after a careful review of the record the court concludes that plaintiffs have not presented any direct evidence of discrimination.

2. Plaintiffs' Circumstantial Evidence

Plaintiffs may establish a prima facie case of discrimination based on indirect or circumstantial evidence. *See Grimes v. Texas Dept. of Mental Health and Mental Retardation*, 102 F.3d 137, 140 (5th Cir. 1996). The burden-shifting procedure in circumstantial evidence cases was enunciated in *McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817 (1973), and reaffirmed in *St. Marv's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993). To establish a prima facie case of discrimination plaintiffs must show (1) that they belong to a protected group, (2) that they applied and were qualified for a job for which the employer was hiring, (3) that despite their qualifications they were rejected, and (4) that the position remained open or was filled with a member of a non-protected group. *See McDonnell Douglas*, 93 S.Ct. at 1824. Once a plaintiff establishes a prima facie case, the defendant must articulate a legitimate, nondiscriminatory reason for its action to rebut a presumption of discrimination. *See McDonnell Douglas*, 93 S.Ct. at 1824-1825. If the defendant does so the plaintiff must produce evidence from which a rational trier of fact could find that the defendants' nondiscriminatory reason is a mere pretext for discrimination. To prove pretext a plaintiff must offer evidence sufficient to prove both that the defendant's proffered reason is untrue and that discrimination was the true reason for the employment decision.

Title VII claims may be proven by showing disparate treatment or disparate impact. Disparate treatment involves intentional discrimination against a protected group. *See Wheeler v. City of Columbus, Miss.*, 686 F.2d 1144, 1150 (5th Cir. 1982). Plaintiffs must show evidence that discriminatory intent motivated the actual employment decisions about which they complain. *See Guillory v. St. Landry Parish Police Jury*, 802 F.2d 822, 824 (5th Cir. 1986). Alternatively, plaintiffs may raise an inference that discrimination motivated the decisions at issue by establishing a pattern or practice of racial discrimination by the employer. *See Wheeler*, 686 F.2d at 1150. Plaintiffs attempt to establish discriminatory animus in both ways.

Plaintiffs also allege a disparate impact of a facially neutral policy of HCCS. *See* Plaintiffs' First Amended Complaint at ¶ 11 (Docket Entry No. 20). Disparate impact claims involve the employer's use of a facially neutral policy that impacts more harshly on one group than another when the policy is not based on valid business considerations. *See Wheeler*, 686 F.2d at 1150. A disparate impact case requires no proof of discriminatory intent. *See id.*

The court will begin by examining plaintiffs' individual discrimination claims and then will examine their collective pattern or practice evidence to determine if they can raise a fact issue as to disparate treatment by showing a pattern or practice of discrimination. The court will then evaluate plaintiffs' disparate impact claims.

a. Avery's Claims of Discrimination

(1) The Northeast Presidency

Avery claims that she was denied promotion to President of the Northeast College based on her race. In response, HCCS states the legitimate, nondiscriminatory reason that Forde was better qualified than Avery for the position. Because HCCS has come forward with a legitimate, nondiscriminatory reason for not promoting Avery to President of the Northeast College, Avery must present evidence sufficient for a reasonable fact-finder to conclude HCCS's reason is a pretext for racial discrimination. *See McDonnell Douglas*, 93 S.Ct. at 1824-1825.

As evidence of pretext Avery testifies by affidavit and in her deposition that minority candidates were awarded an extra point in the job-candidate scoring sheets. *See* Avery Deposition at pp. 186-88, Exhibit A to Defendants' Motion for Summary Judgment (Docket Entry No. 42). However, Avery admits that she does not know whether such scoring sheets were used in the candidate searches in which she participated. *See id.* at p. 189. Avery also does not remember race being indicated on the application forms themselves for the positions for which she applied. *See id.* at p. 197. HCCS has presented evidence that scoring sheets were not used and that the summary rating sheets that were used do not contain a category for ethnicity. *See* Avery Deposition at pp. 344-48 and Exhibit 33, Exhibit A to Defendants' Motion for Summary Judgment (Docket Entry No. 42). HCCS also presents evidence that race was neither indicated on the applications for President of the Northeast College nor taken into consideration in the paper screening process.

See Affidavit of Bruce Austin ¶ 9, Exhibit G to Defendants' Motion for Summary Judgment (Docket Entry No. 42).

Avery also claims that the hiring committee was racially stacked against her, and that people with personal loyalty to Dr. Forde were placed on the committee. *See* Avery Deposition at pp. 194-201, Exhibit A to Defendants' Motion for Summary Judgment (Docket Entry No. 42). This argument works against Avery's allegation that race was the determinative factor in hiring for the two promotions in question: If the hiring committees were hand-picked to be cronies of one candidate, nepotism and not racism was at the root of any unfairness that occurred. Also, the members of the Northeast presidency screening committee were of all races. *See, e.g.,* Avery Deposition at p. 338, Exhibit A to Defendants' Motion for Summary Judgment (Docket Entry No. 42). The two committee members who ranked Avery lowest were both white females. *See* Affidavit of Linda Comte, Exhibit H to Defendants' Motion for Summary Judgment; Affidavit of Margaret Graeff, Exhibit I to Defendants' Motion for Summary Judgment (Docket Entry No. 42). Avery also complains that guidelines for forming and conducting a screening committee were not followed. An employer's deviation from its own hiring regulations or procedures does not, however, prove that discrimination occurred. *See Risher v. Aldridge,* 889 F. 2d 592, 597 (5th Cir. 1989); *Vaughn v. Edel,* 918 F. 2d 517 (5th Cir. 1990). Avery must show that racial animus was the reason for the deviation. *See Risher,* 889 F.2d at 597. Avery presents no evidence that race played a role in the alleged deviation from HCCS hiring policy.

Avery has failed to present competent evidence that HCCS's legitimate reason for not promoting her was pretextual. Accordingly, HCCS is entitled to summary judgment on Avery's claim of discriminatory failure to promote her to President of the Northeast College.

(2) The Central College Presidency

In her EEOC charge Avery alleged that she was denied the presidency of Central College because of racial discrimination. *See* Avery EEOC Charge of Discrimination, Exhibit A to Plaintiffs' Exhibit List for Response to Defendants' Motion for Summary Judgment (Docket Entry No. 52). HCCS moves for summary judgment on this claim because Avery did not allege it in her First Amended Complaint, the live pleading in this action. *See* Plaintiffs' First Amended Complaint (Docket Entry No. 20). Although Fed. R. Civ. P. 8 only requires a short and plain statement of a claim for relief that provides fair notice to the opposing party, Avery's Amended Complaint does not even meet that low pleading threshold. Having amended their complaint to include a plethora of claims, it is not reasonable for Avery now to attempt to proceed on a claim that is not in her amended complaint. Accordingly, the court will grant defendants' motion for summary judgment on this claim.

(3) Vice-Chancellor for Academic Development

Avery alleges that she was denied promotion to Vice-Chancellor for Academic Development because of her

race. *See* Plaintiffs' First Amended Complaint, ¶ 21 (Docket Entry No. 20). Defendants do not move for summary judgment on this claim. *See* Defendants' Motion for Summary Judgment (Docket Entry No. 41) and Supplemental Motion for Summary Judgment (Docket Entry No. 49). However, defendants do argue that plaintiffs have not administratively exhausted many of their claims. *See* Defendants' Motion for Summary Judgment at pp. 3-5 (Docket Entry No. 41). Avery has never filed an EEOC complaint alleging her nonpromotion to Vice-Chancellor for Academic Development. *See* EEOC Charge #330902519 and #30912080, Exhibit A to Plaintiffs' Response to Defendants' Motion for Summary Judgment (Docket Entry No. 52). Because Avery has not exhausted her administrative remedies on this claim, the court will dismiss the claim without prejudice.

(4) Hostile Environment

Avery alleges that she was subjected to a hostile work environment based on her race. She states that on two occasions she heard Dr. Adams, her supervisor, refer to white administrators at the Northeast College as "white tokens." *See* Avery Deposition at p. 236, Exhibit A to Defendants' Motion for Summary Judgment (Docket Entry No. 42). Avery also alleges that when she tried to transfer her secretary for poor performance, Dr. Adams accused her of not liking her secretary because she was black and mentioned that Avery was vulnerable to a lawsuit over her treatment of the secretary. *See id.* Avery also complains of other comments by Dr. Adams, including that Avery and other whites had learned to work the

system to hire their own race, and that it wasn't fair to minorities. *See id.* at 239. Avery alleges that the word "diversity" was used as a code word for race. *See id.* at 233-34.

To establish a claim for hostile environment discrimination the racial harassment must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. *See Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367, 370 (1993), *citing Meritor Savings Bank, FSB v. Vinson*, 106 S.Ct. 2399, 2405 (1986). The employment environment must be both objectively hostile or abusive to a reasonable person and subjectively hostile or abusive to the plaintiff herself. *See id.* at 370. The hostility of an environment is determined by the totality of the circumstances, including the frequency and severity of discriminatory conduct, whether it unreasonably interferes with the employee's work performance, and whether it is physically threatening or humiliating or is a "mere offensive utterance." *See Harris v. Forklift*, 114 S.Ct. at 371.

Although the list of factors in *Harris v. Forklift* that may suggest a hostile environment is not exclusive, none of them is present in Avery's case. Avery alleges approximately 25 incidents since 1991 that she believes were retaliatory *or* racial. *See* Avery Deposition at pp. 44-46, 54, 56, 90-91, 178, 181, 236, 239, 316, 321-323, 400-01, 410-11, 429, 440-42, 451-52, 469-70, 498-99, 515, 522, 524-28, 532, 536, 537-39, 576, 594, 606, Exhibit A to Defendants' Motion for Summary Judgment (Docket Entry No. 42). During this period Avery continued to perform her job, and by all accounts performed it well. All of the alleged events involved mere utterances or requirements that

Avery handle tasks within her job description, albeit in a fashion she found offensive. *See* Avery Deposition, Exhibit A to Defendants' Motion for Summary Judgment (Docket Entry No. 42). While Avery alleges she was given extra work as racial retaliation, she acknowledges that there was a hiring freeze in place and that everyone took on additional work. The events recounted by Avery were neither severe nor pervasive, and do not constitute an abusive environment. *See Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367, 370 (1993), *DeAngelis v. El Paso Municipal Police Officers Assoc.*, 51 F.3d 591, 595 (5th Cir. 1995). Accordingly, HCCS is entitled to summary judgment on Avery's hostile environment claim.

b. Baxter's Claims of Discrimination

Baxter claims that the reorganization in which his position was eliminated was orchestrated to eliminate whites. He acknowledges, however, that he has no proof of that allegation. *See* Baxter Deposition at pp. 70-71, Exhibit B to Defendants' Motion for Summary Judgment (Docket Entry No. 42). HCCS argues that the reorganization had nothing to do with race, but was undertaken for the legitimate and nondiscriminatory reason of moving to a department-chair model of management. Because Baxter presents no evidence that this reason is a mere pretext for racial discrimination, he fails to overcome HCCS's legitimate reason for the reorganization.

Baxter also claims that in October of 1997 he was denied promotion to Dean of Workforce of the Northeast College for racial reasons. *See* Baxter Deposition at pp. 33-34, Exhibit B to Defendants' Motion for Summary

Judgment (Docket Entry No. 42). HCCS argues that Baxter was not promoted because he was not the best candidate for the job and supports this statement with competent summary judgment evidence. *See* Affidavit of Clennis High, Exhibit X to Defendants' Motion for Summary Judgment (Docket Entry No. 42). Again, Baxter fails to come forward with evidence that racial animus was the real motivation behind his failure to secure a Dean of Workforce position.

Baxter alleges that his suspension was racially discriminatory. (*See* Part IV.A.2.b. *supra*.) Because he does not respond to defendants' motion for summary judgment on this claim, defendants are entitled to summary judgment.

Baxter also claims that he was subjected to a hostile work environment because the 1996/1997 reorganization was intended to eliminate white administrators. *See* Baxter Deposition at p. 96, Exhibit B to Defendants' Motion for Summary Judgment (Docket Entry No. 42). Baxter claims that the Chancellor and the Board created the hostile environment by forcing whites out of their positions and refusing to promote them through the reorganization. *See id.* at 96-97. Because Baxter presents no evidence to support these claims, Baxter's treatment by HCCS will not support a claim of a racially hostile work environment.

c. Simmons' Claims of Discrimination

Simmons claims that he was denied two promotions – to Dean of Workforce for the Northeast College and to

College Operations Officer (COO) for Southeast College – based on his race. *See* Plaintiffs' First Amended Complaint, ¶¶ 26-27 (Docket Entry No. 20). Simmons claims he was demoted based on race, and not treated as well during the reorganization as minority Instructional Coordinators.

HCCS argues that Simmons was not promoted because he was not the best candidate for either job. HCCS presents the affidavit of Clennis High, Chairperson of the selection committee for the Dean of Workforce Positions, that Simmons was not one of the top ten candidates for any of the three open positions when they were first posted. *See* Affidavit of Clennis High, ¶ 5 and Exhibit 11, Exhibit X to Defendants' Motion for Summary Judgment (Docket Entry No. 42). When the positions were reposted, Clennis High again chaired the selection committee. *See id.* at ¶ 6. In this round the top sixteen applicants for each position were interviewed; Simmons was among them. *See id.* at ¶ 7. The top five candidates were referred to the College Presidents as finalists; Simmons ranked thirteenth out of the sixteen interviewed and was not referred. *See id.* at ¶ 8.

Simmons presents no evidence that racial animus had a role in the hiring process. Indeed, of the five Dean of Workforce positions at HCCS, four are currently held by whites (two of whom were granted lateral transfers). *See* Affidavit of James David Cross, Exhibit A to Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment (Docket Entry No. 56). The court concludes that Simmons has failed to present any competent evidence that HCCS's legitimate reason for failing to promote him

to Dean of Workforce for the Northeast College was pretextual.

Simmons likewise fails to come forward with any evidence that the COO hiring process was tainted by racial animus. HCCS argues that its legitimate, non-discriminatory reason for not hiring Simmons was that he was not the best candidate for the job. HCCS presents the Affidavit of Larry Mers, the chairperson on the selection committee for the four COO positions. When the positions were initially posted, Simmons ranked 9th out of 14 after a paper review and was interviewed. *See* Affidavit of James David Cross, Exhibit A to Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment (Docket Entry No. 56). Those that ranked above Simmons included five Whites, five Blacks, three Hispanics, and one Asian. *See id.* After the interviews Simmons ranked sixth of the twelve applicants who were interviewed. *See* Affidavit of Larry Mers, ¶ 6, Exhibit Y to Defendants' Motion for Summary Judgment (Docket Entry No. 42).

That search was invalidated, however, due to a formal complaint by a candidate of breach of confidentiality. *See* Mers Affidavit at ¶ 7 and Exhibits 11-12, Exhibit Y to Defendants' Motion for Summary Judgment (Docket Entry No. 42). In the new search Simmons was again interviewed. *See id.* at ¶ 10. Simmons was a finalist in this round and ranked fifth out of nine candidates. *See id.* at ¶ 11. The interviewed candidates included three Whites, one Black, and one Hispanic. *See* Affidavit of James David Cross, Exhibit A to Defendants' Response to Plaintiffs' Motion for Summary Judgment (Docket Entry No. 56). Simmons was not chosen for any of the COO positions, however. Three of the four successful candidates were

white and one was Hispanic. *See id.* Other than his own conclusory allegations Simmons has not presented any evidence of pretext.

Simmons similarly fails to adduce any evidence of racial animus in his treatment following the reorganization that eliminated all Instructional Coordinators positions. No minority administrator was left in such a position; all of the positions were eliminated. Furthermore, Simmons acknowledges that he continued to receive pay at his old level while he was assigned to work as an automotive instructor. *See* Simmons Deposition at pp. 30-32, Exhibit F to Defendants' Motion for Summary Judgment (Docket Entry No. 42). He only held this position for four months, until a position he requested came open.[4] *See id.* at pp. 32-33, 133. Simmons' main complaint appears to be that other former Instructional Coordinators chose positions that were either immediately open or opened sooner than the coordinator position that he preferred. Because Simmons has not presented any competent evidence of discrimination in the reorganization,

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[4] Simmons continued as an automotive instructor *voluntarily* to earn extra money after his new Coordinator position came open. *See* Simmons Deposition at pp. 48-49. Since Simmons was paid at the same level as his previous position, and voluntarily continued to do the instructor's job at night, it can hardly be called a "demotion" at all. Furthermore, this position was Simmons' second choice for a new position; his first choice was a Department Chair position. *See id.* at 69-70. He was interviewed for that job, but found the interview demeaning and declined an offer for that position in summer of 1997. *See id.* at 69-73. Had he not turned down that position, Simmons would not have had to be an instructor at all.

HCCS is entitled to summary judgment on all of Simmons' demotion claims.

Simmons also claims that he was subjected to a racially hostile environment while working at HCCS. Simmons points to incidents in which he claims he was "ignored" by acting President Forde when she would not meet with him and when she did not return his phone calls. *See* Simmons Deposition at pp. 56-71, Exhibit F to Defendants' Motion for Summary Judgment (Docket Entry No. 42). Simmons also believes he was demeaned by being interviewed by his former subordinates for the job of Department Chair. *See id.* at pp. 70-73. However, Simmons presents no evidence that anyone else was treated any differently. He presents no evidence that Dr. Forde was motivated by racial animus; on the contrary, he testifies that she may have been disgusted with his behavior in turning down the Department Chair position he was offered in mid-1997. *See id.* Without more, this is evidence of neither discrimination nor a hostile environment. Accordingly, HCCS is entitled to summary judgment on Simmons' claims of racially hostile work environment.

3. Pattern or Practice

Plaintiffs may prove discrimination by showing a "pattern or practice" of disparate treatment. *See Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1219 (5th Cir. 1995). Isolated and sporadic discriminatory acts are not sufficient to establish a prima facie case of a pattern or practice of discrimination. *See Cooper v. Federal Reserve Bank of Richmond*, 104 S.Ct. 2794, 2799 (1984). Instead, the burden

for establishing a pattern or practice of discrimination requires proof by a preponderance of the evidence that "racial discrimination was the company's standard operating procedure rather than the unusual practice." *See id., citing Teamsters v. United States*, 97 S.Ct. 1843, 1855 (1977).

Plaintiffs make no real effort to support this claim, they merely refer generally to a few exhibits. *See* Plaintiffs' Response to Defendants[']' Motion for Summary Judgment and Brief in Support at ¶¶ 39-40 (Docket Entry No. 51); Plaintiffs' Response to Defendants' Supplemental Motion for Summary Judgment at ¶¶ 2-4 (Docket Entry No. 59). The exhibits plaintiffs refer to are either statistically irrelevant because they fail to compare HCCS's treatment of whites and non-whites or because at best they show the type of isolated events that have been held insufficient to raise a pattern and practice claim.

The only other evidence that plaintiffs present of a pattern or practice of discrimination is the statistical analysis of plaintiffs' expert, David Olsen. Yet, Olsen found that when comparing the impact of promotions, demotions, and lateral transfers on different racial groups the results were not statistically significant. *See* Report of David Olsen, Exhibit B to Defendants' Supplemental Motion for Summary Judgment (Docket Entry No. 49). Having considered plaintiffs' evidence and arguments the court concludes that plaintiffs have failed to prove discrimination through a pattern or practice at HCCS. Because plaintiffs have failed to prove intentional discrimination by HCCS as required by § 1981, HCCS is entitled to summary judgment on plaintiffs' § 1981 claims.

4. Disparate Treatment

Plaintiffs also allege a violation of Title VII through evidence of a disparate impact on whites of a facially neutral policy of HCCS. A disparate impact theory does not require proof of discriminatory intent by the employer, only proof that the challenged policy cannot be justified by business necessity. *See Garcia v. Woman's Hospital of Tex.*, 97 F.3d 810, 813 (5th Cir. 1996). A plaintiff must isolate and identify a particular employment practice that causes the disparity and provide enough evidence to raise an inference of causation. *See id.* If a plaintiff does so, the defendant may respond with evidence that the "challenged practice is job-related for the position in question and consistent with business necessity." *Id., quoting* 42 U.S.C. 2000e-2(k)(1)(A)(i).

Plaintiffs allege that the following policies or practices create a disparate impact: (1) reorganizations of the administrative structure at HCCS, (2) screening committee guidelines, (3) the use of "acting" appointments, (4) lateral transfers, and (5) the award of stipends to building administrators.[5] Plaintiffs utterly fail, however, to present evidence that these practices produce a disparate impact on employment decisions. Plaintiffs' expert, David Olsen, found no statistically significant disparate impact. *See* Report of David Olsen, Exhibit B to Defendants' Supplemental Motion for Summary Judgment (Docket Entry No. 49). Without proof of a disparate impact plaintiffs have

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[5] Plaintiffs also allege facially neutral policies are used to punish white administrators who are "not on board." This identifies no policy and is insufficient to plead disparate impact. *See Garcia*, 97 F.3d at 813.

no evidence of causation. Accordingly, HCCS is entitled to summary judgment on plaintiffs' disparate impact claim.

C. Plaintiffs' Claims of Retaliation in Violation of Title VII

Plaintiffs allege that HCCS retaliated against them for filing EEOC claims. To maintain a claim of retaliation under Title VII a plaintiff must show (1) that he engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the participation in the protected activity and the adverse employment action. *See Long v. Eastfield College*, 88 F.3d 300, 304 (5th Cir. 1996). Plaintiffs must demonstrate that but for the protected activity they would not have suffered the adverse employment action. *See Long*, 88 F.3d at 305, n.4. The burden-shifting evidentiary standard applicable to plaintiffs' claims of racial discrimination also applies to their retaliation claims. If defendant comes forward with a legitimate, non-retaliatory reason for the adverse employment actions in dispute, the focus shifts to the ultimate question of whether unlawful retaliation was the but-for cause of the adverse employment decision. *See Long*, 88 F.3d at 305.

1. Avery's Claims of Title VII Retaliation

Avery claims that she was retaliated against for filing an EEOC charge, for testifying in the *Mullis* trial, and for opposing racially discriminatory practices at HCCS. For the purposes of this analysis the court will treat all of these activities as protected under Title VII. As discussed

above some of the retaliatory acts alleged by Avery are adverse employment actions. Avery has not, however, presented any evidence of a causal link between her protected activities and the alleged retaliation she suffered. HCCS states that these employment decisions were taken for the legitimate reason that Avery was not the best person for each job. Avery has presented no evidence to overcome this legitimate reason. Accordingly, HCCS is entitled to summary judgment on Avery's Title VII retaliation claim.

2. Baxter's Claims of Retaliation Under Title VII

Baxter claims that the reorganization, elimination of his position, failure to promote him to Dean of Workforce, and his suspension were all retaliation for protected activities. Baxter fails to present any evidence causally connecting any protected activities with any of the employment actions he challenges. As discussed above, HCCS has presented legitimate, non-discriminatory reasons for its employment decisions. Baxter has failed to present evidence that the reasons were pretextual or a causal link between his EEOC charge and the actions of defendants of which he complains. Accordingly, HCCS is entitled to summary judgment on Baxter's Title VII retaliation claims.

3. Simmons' Claims of Retaliation Under Title VII

Simmons claims he was denied promotion and lateral transfer in retaliation for protected activities. HCCS has presented legitimate, non-retaliatory reasons for each of

the employment decisions challenged by Simmons. Simmons has presented no evidence of pretext or a causal link between his EEOC charge and the actions of defendants of which he complains. Accordingly, HCCS is entitled to summary judgment on Simmons' claims of Title VII retaliation.

D. Plaintiffs' Claims Under Title VI

Plaintiffs allege that HCCS discriminated against them in violation of Title VI. Title VI provides that no person shall be "excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" on the basis of race, color, or national origin. 42 U.S.C. § 2000d (West Supp. 1999). A claim under Title VI requires proof of: (1) discriminatory intent, (2) that the defendant have [sic] received federal financial assistance the primary objective of which is to provide employment, and (3) that the defendant applied the federal funds to discriminatory programs or activities. *See Nat'l Assoc. of Government Employees v. City Public Service Bd. of San Antonio, Tex.*, 40 F.3d 698, 706 (5th Cir. 1994).

Plaintiffs do not plead any facts specific to their Title VI claim. *See* Plaintiffs' First Amended Complaint (Docket Entry No. 20). HCCS argues that plaintiffs fail to state a claim under Title VI because they have no standing, fail to satisfy the required elements of a Title VI claim, and cannot show intentional discrimination. Plaintiffs fail to respond to arguments made by HCCS that they cannot state a Title VI claim. Plaintiffs only argue that HCCS has

offered no evidence that they do not receive federal funding for hiring. *See* Plaintiffs' Response to Defendants' Motion, ¶ 68 (Docket Entry No. 51). Because plaintiffs bear the burden of proof on this issue at trial, their assertion that defendant must come forward with evidence is not correct. *See Douglass v. United Services Auto. Ass'n.*, 79 F.3d 1415, 1430 (5th Cir. 1996) (defendant need only point to the absence of material fact issues to satisfy its initial summary judgment burden). Accordingly, HCCS is entitled to summary judgment on plaintiffs' Title VI claim.

V. Conclusions

Except as to Avery's claim that she was denied promotion to Vice-Chancellor for Academic Development because that was a "designated black" position, HCCS is entitled to summary judgment on all of plaintiffs' claims. Accordingly, HCCS's Motion for Summary Judgment (Docket Entry No. 41) and Supplemental Motion for Summary Judgment (Docket Entry No. 49) are **GRANTED**. Plaintiffs' Motion for Partial Summary Judgment (Docket Entry No. 50) is **DENIED**. Plaintiffs' Motion to Strike Defendants' Objections to Plaintiffs' Summary Judgment Evidence (Docket Entry No. 66) is **DENIED**. The court has considered all the relevant evidence cited by the parties, regardless of who filed it. Defendants' Motion to Strike Plaintiffs' Expert Witness (Docket Entry No. 54) is **MOOT**.

SIGNED at Houston, Texas, on this 14th day of January, 2000.

/s/ Sim Lake
SIM LAKE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DR. LOIS A. AVERY, et al., Plaintiffs, v. HOUSTON COMMUNITY COLLEGE, et al., Defendants.	§ § § § § § § §	CIVIL ACTION NO. H-98-1859

ORDER

Plaintiffs' Motion for New Trial (Docket Entry No. 73) is **DENIED**.

SIGNED at Houston, Texas, on this 23rd day of February, 2000.

/s/ Sim Lake
Sim Lake
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. No. H-98-1859

DR. LOIS A. AVERY, TOM BAXTER AND ROGER SIMMONS, PLAINTIFFS	§	NOTICE OF APPEAL (Filed Mar. 24, 2000)
VS.	§	
HOUSTON COMMUNITY COLLEGE SYSTEM AND THE BOARD OF TRUSTEES FOR THE HOUSTON COMMUNITY COLLEGE SYSTEM, DEFENDANTS	§	

Notice is hereby given that Plaintiffs, Dr. Lois A. Avery and Roger Simmons hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Final Judgment entered in this action on January 18, 2000 (Instrument Number 72) and from the following orders:

1. Memorandum and Order Granting Summary Judgment on January 14, 2000 (Instrument Number 72);

2. Order denying Plaintiffs' Motion for New Trial on February 23, 2000 (Instrument Number 76).

Respectfully submitted,

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ASSOCIATES, P.C.

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